NO. 90-6105

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1990

JOHN H. EVANS, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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75 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT AN AFFIRMATIVE ACT OF INDUCEMENT BY A PUBLIC OFFICIAL SUCH AS A DEMAND HAS TO BE SHOWN BY THE GOVERNMENT IN AN EXTORTION CASE UNDER COLOR OF OFFICIAL RIGHT?

II. WHETHER, IN THE ABSENCE OF THE HOBBS ACT CONVICTION, EVANS WAS PROPERLY CONVICTED FOR MAKING A FALSE STATEMENT ON HIS INCOME TAX RETURN?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 910 F.2d 790 (11th Cir. 1990), and is set forth in the Joint Appendix at p.32.

Citations herein are to the Joint Appendix (J.A.), the district court record on appeal (R), and video and audio tapes included in the record on appeal (T).

JURISDICTION

Petitioner's conviction for violations of 18 U.S.C. § 1951 (The Hobbs Act) and Title 26, U.S.C. 7206(1) was affirmed by the United States Court of Appeals for the Eleventh Circuit on September 6, 1990. The Petition for a Writ of Certiorari was filed on October 29, 1990, and granted by the Court on June 3, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, U.S.C. § 1951 ("The Hobbs Act") and Title 26, U.S.C. § 7206(1) are the statutes involved and are reprinted in the Appendix.

STATEMENT OF THE CASE

1.

Procedural Background

This action commenced on June 16, 1988 in the Northern District of Georgia with a two count indictment against John H. Evans, Jr. alleging the defendant extorted $8,000 from an FBI undercover agent in violation of Title 18, United States Code, § 1951 and that $7,000 of that payment was not reported on his Form 1040 individual income tax return for the year 1986, in violation of Title 26, United States Code, § 7206(1).

Mr. Evans entered a plea of not guilty on June 22, 1988. He was tried before a jury with the Hon. Horace T. Ward, United States District Judge, presiding. The trial commenced on January 30, 1989. After six weeks of trial, on March 13, 1989, the jury returned a verdict of guilty on both counts. [R44-7].

On May 16, 1989, John H. Evans, Jr. was sentenced to the Custody of the Attorney General for 18 months on the extortion offense under 18 U.S.C. § 4205(b)(2). On the tax charge, Evans received an 18 months suspended sentence with 4 years probation and special conditions that Evans neither seek nor hold public office during his probation period and that he cooperate with the Internal Revenue Service in resolving his tax liability. Evans also received a $50.00 assessment on each count. [R43-107-08].

On May 26, 1989, United States Magistrate John R. Strother appointed C. Michael Abbott to represent defendant John H. Evans,

Jr. for post trial matters and for this appeal. [R3-88] On May 26, 1989, Evans filed a Motion for New Trial on the ground of newly discovered evidence and a Motion for Release Pending Appeal. On July 28, 1989, the District Court denied both motions without a hearing. [R3-90, 93, 104, 105].

On August 4, 1989, defendant Evans filed a timely Notice of Appeal to the Eleventh Circuit Court of Appeals. [R3-tab 106]. The conviction was affirmed by the Eleventh Circuit on September 6, 1990. Defendant filed a petition for certioari on October 29, 1990. The petition for certioari was granted by this Court on June 3, 1991.

Factual Background

In March of 1985, with no prior allegation of corruption against John Evans, the Federal Bureau of Investigation (FBI) began an investigation of him that was to continue for the next thirty-one months, through October of 1987. The investigation produced twenty-eight secretly taped video and audio conversations with Evans, and five contacts that were not recorded. [R25-72]. Every contact with Evans over the two and one half year investigation was initiated by the FBI.[1]

John Evans was first elected to the Board of Commissioners in Dekalb County, Georgia in 1982, the first black ever to be elected

[1] The government's position is that Evans initiated one call which triggered the July 24, 1986 meeting. The defense contends the undercover agent initiated the call. See pp.13-14, infra.

to that body. He won a second four year term in 1986. Although Evans' position on the Dekalb County Commission was considered to be half time, Evans devoted full time to his Commission duties. His annual salary as a Commissioner was approximately $16,000. [R32-49-51; R38-47,124].

The focus of the undercover investigation in this case occurred during Evans' re-election campaign of 1986. Evans contends that he accepted a campaign contribution that was unrelated to the assistance he was willing to provide and that he used the contribution given to him by the undercover agent for debts of his campaign and office. He denies that he conditioned his support of the project in question upon receiving any contribution and asserts he was entrapped by the agent, particularly with respect to his nondisclosure of $7,000 of the $8,000 he received.[2]

The undercover operation began in early 1985 when Special Agent Clifford Cormany [Cormany], an experienced agent of the Federal Bureau of Investigation (FBI) with over 19 years of Bureau service, was assigned to the Atlanta office of the FBI to assist in conducting an undercover investigation to be known as "Operation Vespine." [R22-30; R25-98]. Cormany was to investigate "allegations of public corruption in the Atlanta area, particularly in the area of rezonings of properties." [R22-31]. Using an identity of "Steve Hawkins," Cormany "represented [himself] as a land developer who had recently moved to the Atlanta area." [R22-31].

[2] See Mathews v. United States, 108 S.Ct. 883 (1988). (Defendant may deny offense or an element thereof and rely on entrapment).

Special Agent Cormany became part of a group known as WDH Developers. [R25-123]. Assisting him was Special Agent Bob Hood of the FBI posing as "Bob Howard." Eddie Wood and Clifford Hornsby were the "W" and "H" of WDH. They were being monitored by Agent Cormany. The agent was also monitoring Albert Johnson [Johnson], an associate of Wood and Hornsby and a target of the investigation. [R22-32; R25-123].

Although Agent Cormany's mission was to investigate "allegations of public corruption," he had received no allegation regarding John Evans when he agreed to accompany Johnson to a meeting with Evans on March 14, 1985. According to the agent, Johnson had set up the March 14 meeting with Commissioner Evans without the agent's knowledge. [R22-60].

Evans was well known for an open door policy and would meet with any person or group who requested his assistance. [1T-40; R30-250-51]. Johnson, his partner Cliff Hornsby and Agent Cormany met Commissioner Evans at a "Denny's" restaurant on March 14, 1985. The meeting was not taped. According to the agent, Johnson told Evans that since Johnson's retirement, he had associated himself with a group of individuals who were developing land in the Atlanta area. [R22-33]. In connection with their efforts, the group anticipated coming before governmental bodies for rezonings, etc. Johnson wanted to know if they could feel free to call on Evans for his assistance. Johnson was said to have told Evans they would make it worth his while if they did contact Evans. [R22-34]. Evans replied in general terms to Johnson that he would be willing

to assist, "if [he were] able." [R22-36].

Approximately five months later, Agent Cormany instructed Johnson to set up a second meeting with Commissioner Evans. [R22-60]. At the time of this August meeting, Johnson was still a target of the investigation. Evans had made no attempt to contact Cormany or any other member of his group between the March and August meetings. [R22-36-37].

Johnson and agent Cormany had agreed that they would use the term "leg up" to describe what they were seeking. However, from their conversations a "leg up" often appeared to mean a willingness to work harder than others, to touch all bases and to educate others about the viability of their project.

The August meeting was videotaped. Johnson began the meeting by telling Evans that he and Cormany ["Hawkins"] were forming a syndicate to buy land. [1T-5]. Johnson continued:

Johnson: One, one, uh, and I'm being quite candid. One obvious thing that we're looking for is a leg up on other developers.

Evans: Um-hmm.

Johnson: You know by, by being associated with, with those bodies that govern these things. Right? That's part of my usefulness to Steve [Hawkins]. [1T-5].

. . . .

Johnson: Uh, and quite frankly, what we were looking for and what we want with you, uh, is that leg up in Dekalb County . . .

Evans: I understand.

Johnson: . . . to help in getting zonings done, and we're not talking about something that's going to be so terrible . . .

. . . .

Johnson: But, uh, what we want to do with you and whomever in Dekalb County that you uh, that you can help work into this is to develop in Dekalb County . . . and to do it in such a way that whatever it costs, within reason, obviously, whatever it costs for expense monies we'll do. [1T-6-7].

. . . .

Cormany: And, and, I hope I'm not being too blunt, but what we want, our ability to sell this package to them is to convince them that we do have a leg up, because anybody, can, can buy land and do what the hel-, whatever they want to do with it. [1T-8].

Evans initial response is instructive:

Evans: *Well, . . . I think I understand exactly what you'll (sic) talking about. I don't have any questions. You have to, have to understand that a leg up does not begin with a G. And you know what a G means? A guarantee. A leg up does not mean that. It could never mean that.* [1T-12]. (emphasis supplied).

"Hawkins" and Johnson both responded that they understood there were no guarantees. [1T-12].

Evans went on to explain his concept of the zoning process and how it involves compromise and working with the community:

Evans: Well . . . for example . . . when this zoning that we dealt with the other day came through. There was still some . . . gray areas. So we just deferred the thing. Gave the folk the opportunity to go back and do what they should have done in the first place. When they went back, did what they were supposed to do, made one or two concessions about this, that and the other, came back, we approved it. [1T-23].

Evans also emphasized sensitivity to community needs:

Evans: They [the developers] just by-passed, tried to by-pass the community. Were . . . not sensitive to what the folks had on their minds, and so forth and so on. So when it came [before the Commission], it was gone before it got there. [1T-28].

Johnson led Evans to believe they agreed with his common sense

approach:

Johnson: Well we aren't gonna operate that way. We'll follow the form the way it should be. With some substance in it. The zoning will be . . . involved with the folk . . . in discussing it and . . . do what we know we should do. [1T-28].

Johnson also said he understood Evans' description of the zoning process and they would try to do it right the first time because they were going to run a first class operation. [1T-23]. Johnson confirmed the legitimacy of WDH noting that they were not really talking about "anything illegal," [1T-43], and would not be asking for anything unreasonable where they wouldn't have a good chance to succeed. [1T-48]. He went on to further explain their concept of a "leg up" in language similar to Evans' own view:

Johnson: *And all we're asking for is to be able to tell these people [investors] . . . we feel very very confident and we do kinda have a leg up . . . on the others. We've taken the time, taken the opportunity to, made the opportunity . . . and, taken the time to get acquainted . . . to explain the program a little bit.* [1T-56]. (emphasis supplied).

Beginning with the first videotaped meeting, Evans repeatedly encouraged Agent Cormany and Johnson to talk with Charlie Coleman, the staff zoning administrator in Dekalb County. Coleman was described as "straight as an arrow" and an experienced and solid professional in zoning matters. [R31-185; 7T-26-27]. Evans pointed out that Coleman could give them a feeling for what was feasible and it was in Coleman's office where adjustments in projects were hammered out. [1T-29]. Evans also suggested that Johnson and Cormany meet face to face, first with "two or three of the more sensitive" Commissioners, but eventually with all of them so that

Johnson and Cormany could talk independently of Evans and the other Commissioners would get to know who they were and what they were about. [1T-35,42,49]. *This was Evans' perception of a "leg up."* [R32-76; R34-58]. Agent Cormany said they were in favor of doing that. [1T-49].

Viewing the communication among Cormany-Johnson-Evans in a light most favorable to the government, Johnson and agent Cormany sent mixed messages to Evans. They would never use the word "payoff," nor openly acknowledge they had anything illegal in mind. As a result, it was never clear that Evans "caught on" to their scheme.

Evans was not contacted again until some nine months later in May of 1986. Johnson was then cooperating with the FBI. [R28-14-15, 46-47]. In May, the agent and Johnson had talked about how they wanted to get the highest density possible and were willing to do what needed to be done to get it. Whether that meant they were up to something shady or merely that they were ambitious, industrious and willing to work hard to obtain results is unclear from the context. [2T-12-13]. Evans deflected the conversation:

> Johnson: We're willing to do whatever it is we need to do . . . to get it passed.
>
> . . . .
>
> Johnson: What do we need to do?
>
> Evans: Um?
>
> Johnson: What do we need to do?
>
> Evans: Well, I don't know.

> Johnson: What do we need to offer?
>
> Evans: I don't know.
>
> Johnson: Ain't nobody here but us.
>
> Evans: No, that's all right, but I, no that. . .Um, we've kinda got a little situation where we may have to do a few things, we do 'em and I'm not sure what's all involved all the time. Same set of circumstances does not apply in every case. [2T-16,17].

There was discussion of Evans' campaign for re-election which was just getting off the ground. The primary was on August 12th, 1986. Johnson asked Evans if he needed "any expense money for coming out here this morning?" [2T-36]. Earlier in the conversation, Johnson had mentioned a campaign contribution and Evans took the remark in that context:[3]

> Evans: Well, I gotta, let me tell ya what I just got to do. I gotta order my voter registration list.
>
> Johnson: How much does that cost?
>
> Evans: I'm not sure, I got to call. Voters [sic] registration list and labels. I'm gettin ready to do a precinct mailing, again. [2T-36].

Evans estimated that between the voter registration list and mailing labels, it would cost him about $260.00. [2T-37]. Johnson asked Cormany to help Evans buy his voter registration list and Cormany gave Evans a $300 contribution. [2T-37,41]. Evans introduced into evidence his ledger book and checks from 1986 showing that he spent $284.56 for items relating to his mailing in

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[3] Earlier in the meeting Johnson had asked what size contribution Evans would consider "meaningful." Evans replied by referring to a recent breakfast held for him where guests were encouraged to contribute $1,000 apiece. [2T-27,28; See also R30-240].

May of 1986, including over $200 that very day for labels and postage. Evans properly disclosed the agent's contribution and sent a thank you note to the undercover agent. [R33-9]. He made no attempt to recontact Cormany or Johnson.

Five weeks later, on July 8, 1986, Cormany and Johnson asked Evans to meet with them for lunch at a Decatur restaurant. During the luncheon meeting, they informed Evans for the first time that they had a particular tract of land in mind and that expense monies would be available if needed. As in the two previous meetings with Johnson and Cormany, Evans again recommended that they meet with the zoning staff professional Charlie Coleman of the Planning Department for assistance. [R22-86,87; See also 1T-29; 2T-23].

There are two versions of what happened on the morning of July 23, 1986. According to the agent's testimony, he had not heard from Evans since their July 8, luncheon. The primary was now 20 days away. The agent testified that on the morning of July 23rd at approximately 9:20 a.m., he received a call from John Evans at the undercover residence he used. No recording was made of this conversation according to the agent because he was not expecting that call at his undercover residence. [R22-91].

Evans testified that around 9:00 a.m. on the morning of July 23rd, he had called the Dekalb County Commission for messages. Twenty people, including agent Cormany had left messages for Evans. Cormany's message asked Evans to call him and left the number of the agent's undercover residence. [R33-18,19]. The phone message Evans had received from Cormany was introduced into evidence. [R33-

15-36].[4]

Cormany called Evans back at 10:15 a.m. This conversation was recorded. Cormany called Evans back a third time. Cormany said he told Evans they needed to meet and suggested that Evans come to his office the following day, July 24th. [R26-163-64]. Evans testified the agent wanted to consider a contribution to his campaign and therefore prepared a list showing receipts and proposed expenditures. [R33-38-40,48-49]. The agent did not record this 11:20 a.m. conversation as he said it was "not feasible" to do so. At trial the agent was unsure of the circumstances that caused him to indicate that it was "not feasible," offering two possible explanations. [R26-160-62].

By the time of the July 24th meeting, the agent had been courting John Evans off and on for some sixteen months. Evans had told the agent and his group that he was willing to assist them "if he were able" at the very first meeting in March of 1985. [R22-36]. The reason Evans was willing to assist Cormany and to go to his office was simple according to Evans: he had been asked to help and that was his job. [R32-75,77].

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[4] In fact, the complete phone message book from 1986 covering this period which had four intact messages for every page, including the Cormany ["Hawkins"] message was introduced into evidence. The government subsequently suggested to the jury that Evans fabricated the message. [R37-33-51]. The defendant filed a post-trial motion after having the log in question and several others examined by a document examiner who conducted a relative aging analysis. The examiner concluded that the entries examined in the phone book in question (including the July 23, 1986 entry) were prepared contemporaneously, and that no evidence indicated otherwise, i.e., the entry was genuine. The government had the ink tested and found the dye lot was indeed in existence prior to the July 1986 message. [R43-96-97,100-02].

At the meeting, Cormany told Evans that his development would come within the new comprehensive land use plan, a representation that would turn out to be false. [7T-8,11]. Evans emphasized how important it was that it come within the plan stating the project needed to be as "on line" as possible so Cormany's group would not have to worry about making changes [7T-17-18]. Without requesting anything in return, Evans repeated his commitment of support early on:

> Cormany: But, ahhh. We just need to know if you can, ahh, support us on this?
>
> Evans: Well, I can support you. You just need to make sure that we know what kind of hills we've gotta climb. And that's . . . important in this racket. [7T-17].

The agent tried again:

> Cormany: Tell me if I'm, you know, if I'm being rude cause I told you I'm still a neophyte, ah, and I'm not, ah, politically oriented by any means but we have a, ah, obviously we have a budget[5] to get these things through.
>
> Evans: Sure.

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[5] Cormany mentioned his "budget" for expenses numerous times to Evans although it was often not clear that Evans understood his intentions or knew how to respond to entreaties of this kind. Witness this exchange after the July 25th meeting:

> Cormany: Well, if there's anything I need to do at all, you know I told you that . . . I gotta, I gotta a budget that's . . .
> Evans: I was just thinking, I was just thinking and I haven't thought of much.
> Cormany: Uh-huh. You know this, this budget I've got is strictly at my discretion. You know it's . . .
> Evans: Oh yeah, but I still don't, uh, haven't thought of anything that you need to do. Particularly, you understand? [14T-6; See also 20T-12,13].

> Cormany: And you know I need to know what, what it takes for your help.
>
> Evans: Well I don't know, that I can't answer . . . ahh. [7T- 23].
>
> Cormany: Any influence you need to to exert on your friends. and . . .
>
> Evans: Yeah, that part I don't, don't know right now, ah . . .
>
> Cormany: When, I mean, at what point do you think you would know?
>
> Evans: I'm tryin' to think, you know, the point I'm talking about is, ah, the rest of 'em. Ahh . . .
>
> Cormany: On the rest of the, ahhh . . .
>
> Evans: What you need to get the thing through, you know, on Bob, you know, on Brince, and probably all of'em. [7T-24].

Evans had given the same non-response to Johnson in the May meeting. Cormany gave Evans another opportunity to solicit a payoff with a question about Charlie Coleman, the staff zoning administrator:

> Evans: Why, of course, Charlie [Coleman] is probably one of the strongest links in this whole thing . . . in terms of his recommendation.
>
> Cormany: How do I need to deal with him? I mean . . .
>
> Evans: Hey, you just deal with him professionally.
>
> Cormany: Okay. [7T-26].

When Cormany subsequently made another reference to his budget, Evans took it as his cue. [7T-31]. As he sat in front of the hidden camera, Evans reviewed his list and added to his total receipts a $50 check in his pocket that he had not yet had a chance to add to his calculations of the night before, having received it

only that morning so that the estimated budget figures he gave to the agent would be as accurate as possible. He then announced from his hand-penciled $14,180 budget covering June 29 to August 12 (primary day), that he had received $6295, leaving a shortfall of $7885. [7T-31-33]. At trial, Evans introduced into evidence the original list shown to the agent as well as a bank deposit slip showing the deposit of the $50 contribution into his campaign account. [R33-40,50-51].

Cormany noted that Evans' budget only went through August 12th, the inference being that perhaps Evans could use more money after the primary. Evans made clear to the agent that he had no need for campaign money after August 12th because if he got past the primary, he would have no opposition in the general election. [7T-31]. Undaunted, the agent continued:

Cormany: Can I, can I talk frankly with you . . .

Evans: Yeah.

Cormany: And, and this is between you and I. I need, I desperately need, your help and your support on this project. You, I'm in one business, you're in another.

Evans: *Yeah, yeah, you got me.* [7T-33]. (emphasis supplied).

Evans was indicating his support was not in issue. Cormany then said that because of Evans' assistance and influence, he could cover the entire amount of the shortfall. [7T-33]. Evans immediately balked and said Cormany did not understand:

Evans: *Well, let me tell you. I, it's it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to*

handle of that. [7T-33]. (emphasis supplied).

Evans had repeatedly told Cormany over a long period of time that he would assist him. Cormany now said he wanted to contribute to a campaign two weeks away. Evans, in his awkward way, tried to tell the agent that how much Cormany gave and what Evans did to assist were not related:

Evans: Oh, I'll, let me let me make sure, and I understand both of us are groping . . . for what we need to say to each other.

Cormany: I want, I don't want, ahh . . .

Evans: Naw, I understand . . .

Cormany: I don't want to piss you off John.

Evans: No, no, no, ain't gonna be none of that.

Cormany: I'm a business man.

Evans: This is, and I understand.

Cormany: All I want . . . let me, let me kinda . . .

Using the past tense, Evans emphasized his past promises of help:

Evans: I'm gonna work. Let me tell you I'm gonna work, if you didn't give me but three, on this, I've promised to help you. I'm gonna work to do that. You understand what I mean?

Cormany: Yeah.

Evans: *If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do.* (emphasis supplied).

Cormany: I understand.

Evans: You see, what I'm doing is giving you a fair assessment of what my needs are to be re-elected on August 12th.

Cormany: Okay. [7T-34-35].

Cormany tried to rehabilitate his position:

Cormany: By the same token if I came in and said, John, I want you to do all this, help me with all this, and take all, all this heat from the people that show up at the public hearing and everything . . .

Evans: Right.

Cormany: . . . and good luck on your campaign.

Evans: Right.

Cormany: I don't think (LAUGHS) you'd be that inclined to help me.

Evans: *Well, let me tell you.* (emphasis supplied).

Cormany: [interrupts] And that's, and that's not, that's just business. [7T-40,41].

Evans answered by stating that regardless of Cormany's contribution, there were limits to how he would assist:

Evans: Well, you have to understand, too, that, ahh, regardless of what we did, I wouldn't go off the ninth floor out the window, regardless of how, how we operated. I wouldn't get on the ledge of the ninth floor and jump out.

Cormany: What, now I'm sorry, I don't, I don't . . .

Evans: Naw, I'm just saying regardless of how you help me, if if if things were crazy and wild and I'd say here's a red flag (LAUGHS). You know what I mean. I would not jump out the ninth floor window. I'd just do what I think's prudent under the circumstances. Ah, but those are far-fetched situations. [7T-41].

In summary, Evans had never indicated that Cormany was required to make any campaign contribution nor did he place any conditions on his help. He was certainly willing to accept a campaign contribution for the primary but Evans had long ago promised his support and that promise stood, regardless of the size

of any contribution Cormany wished to make. [R33-76-78]. Cormany wished to make a contribution of $8,000.00.

Evans testified that the amount of the contribution surprised him and was so great that he feared his constituents would not understand it. [R33-79-80; R34-100]. When the agent offered "cash" or "check," Evans then decided to take the bulk of it in cash, recording only a $1000 check. [7T-44; R33-79]. Cormany then asked Evans to keep the matter confidential beween the two of them and Evans agreed to do so. [7T-45].

The government contribution would be the largest contribution of Evans' campaign, eight times what Evans suggested to Al Johnson in May would be a "meaningful" contribution and by far the largest contribution Evans had ever received as a public official. [R33-76-77].[6]

Cormany contacted Evans again later on July 24th when he discovered for the first time that the property WDH was interested in developing had been rezoned within the past 24 months (in November of 1984) which meant that it was not eligible for another rezoning for two years, or until November of 1986. [R23-72,73].

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[6] The relative modesty of the Evans campaign financial picture was disclosed when the amount of contributions received by Evans and other candidates for the Dekalb County Commission came up during the course of the July 25, 1986 meeting. Evans had mentioned an error in an Atlanta Constitution article appearing the day before which listed the amount of campaign contributions candidates for the Commission had received to date. 10T-48. According to the article, Commissioner Lanier led in contributions with $136,274, most of which came from real estate developers. Evans was listed as having received about $91,000. *In fact, the correct figure for Evans was only $19,000.* The afternoon paper, the Atlanta Journal, corrected the error. R23-87,88; R33-12-14; R34-44-48.

When Evans and Cormany met on the 25th of July, much of the conversation was centered around whether or not this unforseen two year requirement could be waived. Evans indicated that a waiver of the two year requirement was routinely done as a matter of courtesy if a hardship existed, and should not be a problem. [10T-24,25; R33-81]. He suggested again that the real key was for Cormany to get with the staff zoning administrator Charlie Coleman to hammer out any problems in their proposal. [10T-16,22-23].

When the agent reintroduced the topic of their agreement made the day before and gave Evans the contribution, Evans said he appreciated "Hawkins" even talking with him about a campaign contribution. [10T-47].

Evans willingly set up luncheon meetings with two commissioners, Commissioner Manning and Commissioner Morris, so that Cormany would have an opportunity to familiarize them with his project and the waiver. As the result of the agent's explanation of why the two year rule should be waived, Commissioner Manning indicated his willingness to vote for the waiver. [R24-59]. The development project was in the district represented by Commissioner Morris. Morris indicated he would support the waiver if the zoning request would be within the comprehensive plan. Cormany said it would. [R27-31]. At the Commission meeting, the waiver was granted 4-0. Cormany had personally lobbied for 3 of the 4 votes he received. [R24-68,69].

On August 27, 1986, Cormany filed a petition for rezoning. [R24-74-75]. When the agent called Evans on August 28, 1986, he

told Evans for the first time ever that the project actually filed was not within the comprehensive land use plan and there was a "possibility" there would be an increase in density of about two units per acre.[7] [22T-3-4].

As late as October 8, 1986, the last time Evans met with the agent on this project, Evans repeated what he had said on July 24th, i.e., he wanted to make clear he could not guarantee results and did not control other Commissioners:

> Evans: Let me tell you, what you have to do is you have to . . . check with the folk and then you pray a little bit, like in all cases, that something doesn't trigger off some other reaction. And nobody ever knows that. Nobody ever knows that. I don't care what . . . it is or who it is or even if . . . Joe Frank Harris [Governor of Georgia] came up there, he couldn't be sure of nothing. *I mean I say that just to make that you're clear . . . that I don't think any of us have that kind of superior control over anybody for any reason . . . .* [26T-32]. (emphasis supplied).

Agent Cormany finally decided to end the project by withdrawing the zoning application without prejudice. He wrote a letter to each Commissioner explaining his position. [R25-64-66]. Cormany appeared before the Board of Commissioners on October 28, 1986, and the Board agreed to allow him to withdraw his petition

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[7] The application filed requested R-50 zoning. The previous RCD zoning would allow 4 1/2 units per acre but the particular plat of land being developed had a restriction of 3 units per acre voluntarily placed on it by the previous developer. [R31-55]. Hawkins' application would have allowed about 5 units per acre, up 1/2 unit from the normal zoning of 4 1/2 and up 2 units per acre from the voluntary condition placed on this particular plat by the previous developer. [R24-75; R27-83; R31-59].

without prejudice. [R25-66-68].[8]

The agent's contacts with Evans ended at that point with regard to the zoning matter. He did call Evans twice in 1987, once in April and once in May. He also had a tape recorded meeting with Evans at Evans' home in May of 1987. [R25-69-70]. None of these contacts was fruitful in terms of obtaining additional evidence against Evans and none was played for the jury.[9]

Gerald Eugene Frink, a revenue agent with the Internal Revenue Service testified that for the year 1986, the joint return of John and Ina Evans reported a gross income of $24,002.78 for a family of four and did not include the $7,000 Cormany contribution. [R28-222,226-228,238]. Frink testified that if an elected official received a payoff he would have to report that as income [R28-231] but if he received a political contribution used to pay off campaign debts, that would not be income. [R28-239].

No Commissioner or lay witness ever testified that Evans

[8] Both the Planning Department of which Charlie Coleman was a part and the Planning Commission, an advisory group, recommended against the merits of "Hawkins" project. [R24-92,94,97]. A local citizens group, the Community Council, recommended approval of the project. [R24-91]. The evidence showed that Evans' support of the project was entirely consistent with his past voting record. [See R32-19-23].

[9] On October 7, 1987, two FBI agents went unannounced to Evans' office to see if he would disclose the amount that Cormany had given to him. They did not tell him he was a target of an investigation, and they misrepresented their official purpose. [R28-137]. In response to a question asking Evans to identify persons who contributed more than $500 to his campaign, Evans identified "Hawkins," but incorrectly stated there were no additional monies not reported from anyone on the list of names shown to him. [R28-130-31]. Cormany, while posing as "Hawkins," had earlier solicited a promise from Evans that neither of them would disclose the additional amount to anyone. [7T-45,47-48].

attempted to influence them in any way on "Hawkins'" project. Charlie Coleman, Assistant Director of the Planning Department testified that he encourages developers and particularly first time developers in Dekalb to contact his department for assistance. [R31-52]. Coleman also testified that John Evans had not tried to infuence him on this or any other zoning matter. [R31-58].

Commissioner Morris and Commissioner Manning both testified that they did not consider that Evans had lobbied them on behalf of "Hawkins'" project. [R31-187,223]. Evans testified he had mentioned the waiver to Commissioner Schulman [17T-2-3] but he had never contacted Commissioners Lanier, Fletcher or Williams with regard to Cormany's project. [R33-111; R37-70-71].

Although Evans spent the money he had projected on the list he showed to Cormany, he ended up both raising more and spending more than he had anticipated. Therefore, at the end of his campaign even though he had spent almost $7,000 more than the $14,000 projected budget he showed Cormany, he still had a surplus of over $7,000, including the cash contributed by Cormany. [R33-87-89; R34-25-26]. Evans' explanation was that in a political campaign, he never knows for sure what he might need and therefore never quits trying to raise money. [R33-94].

Evans testified that since he had money left over from the campaign, he used $4100 of the $7,000 cash from "Hawkins" to repay his mother, Margaret Berry, who had loaned him $5200 for his first campaign in 1982. That $5200 loan from his mother had been duly recorded on Evans' 1982 disclosure form for his 1982 campaign.

[R33-97]. Both Evans and his mother testified that in November of 1986, he made the $4100 partial repayment to her, in cash, just as he had received it from her six years earlier. [R33-99].

In December of 1986, Evans used the rest of the $7,000, a sum of $2900, to repay himself for loans he had made to his own campaign. Over the years 1982-86, Evans had made close to 350 loans to his own campaign, each of which had been duly recorded on his books. [R33-100-01].

Because of the size of the agent's contribution and because Cormany asked him not to disclose the money, Evans said he did not record the $7,000 in cash on his books nor on the required state disclosure form. He also did not record the repayment to his mother or the repayments to himself which came from the same cash contribution. Later, Evans determined that he had to record the "Hawkins" contribution to keep his books straight. The $4100 he repaid his mother in 1986 and the $2900 he repaid himself in late 1986 and early 1987 both came before Evans knew of the undercover operation. However, a year later when Evans recorded these payments in his books in order to keep them straight and amended his state disclosure forms, he knew he was under investigation and he had counsel. [R33-96-104,106-07].

SUMMARY OF THE ARGUMENT

I. Title 18 United States Code, Section 1951 provides in relevant part as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commere . . .by robbery or extortion . . .in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

There appears to be general agreement among courts and commentators that the "extortion under color of official right" clause in 18 U.S.C. § 1951(b)(2) is to be read as requiring "the obtaining of property from another, with his consent, induced ... under color of official right." The question presented for review is whether or not an affirmative act of inducement by a public official, such as a demand, has to be shown by the government in an extortion case "under color of official right."

In 1972, the seminal case of United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972), established that no proof of threat, fear, or duress was required in a case brought "under color of official right." In short succession, six other circuits followed Kenny's lead. It was not until 1984 that the Second Circuit, sitting en banc, provided an opposing view, holding that extortion

under color of official right does not occur when a public official merely accepts unsolicited benefits knowing that they were given because of his public office. In United States v. O'Grady, 742 F.2d 682, 687 (2d Cir. 1984) (en banc), the court held that although receipt of benefits is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of benefits. In 1988, the Ninth Circuit, also sitting en banc, agreed with the Second Circuit's decision in O'Grady. United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc).

In 1990, the Eleventh Circuit reaffirmed its past holdings, following the majority rule, stating:

> the requirement of inducement is *automatically* satisfied by the power connected with the public office. Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. "The coercive nature of the official office provides all the inducement necessary." United States v. Evans, 910 F.2d 790, 796-97 (11th Cir. 1990) (emphasis in original).

It was the view of the court in Kenny, supra, that the under color of official right language repeats the common law definition of extortion, a crime which could only be committed by a public official, and does not require proof of threat, fear, or duress. Id. at 1229.

At common law, extortion under color of official right consisted of a public official unlawfully taking, by color of his ofice, fees that were either not due, or more than is due, or before it was due. This common law misdemeanor was of importance

"in the days when public officials received their compensation through fees collected and not by fixed salary." State v. Begyn, 167 A.2d 161, 166 (N.J.S.Ct. 1961), *cited in* Kenny, supra.

The evidence indicates that there was little or no discussion of the color of official right clause when it was first passed as a federal offense in the Anti-Racketeering Act of 1934, or in its successor, the Anti-Racketeering Act of 1946, known also as the Hobbs Act. The 1934 Act was intended to "set up severe penalites for racketeering by violence, extortion, or coercion, which affects interstate commerce."

The Hobbs Act carries a penalty of twenty years imprisonment, a far cry from the one year penalty for the common law misdemeanor. Petitioner submits that there is no evidence that Congress intended to adopt the common law definition of extortion under color of official right as defined in State v. Begyn, supra.

The definition in the 1934 Act was adapted from New York statutes which retained the distinction between bribery and extortion. In a bribery offense both the payor and payee are considered guilty parties whereas in an extortion offense, the payor was considered a "victim" and the element of duress was essential to the offense. These distinctions between bribery and extortion are maintained to this day in the federal code. *E.g.*, *compare* 18 U.S.C. § 201 *with* 18 U.S.C. § 1951.

The facts of the case under review demonstrate the blurred distinction between bribery and extortion under the federal scheme as currently interpreted by a majority of appellate courts. The

evidence against the petitioner Evans is more conducive to a charge of bribery than one of extortion, i.e., there is little evidence that Evans was conditioning his support on the receipt of a campaign contribution. Furthermore, the "payee" was clearly the aggressor over the sixteen months he pursued Evans and would normally be considered a guilty party were he not an undercover agent.

The plain meaning of "extortion," the development of the Hobbs Act as a "racketeering" statute focused on providing substantial sanctions for behavior based on force, violence and coercion and the distinction that existed at the time between bribery and extortion, in addition to the lack of evidence that Congress intended to make this clause of the Hobbs Act applicable to bribery, support petitioner's claim that an element of duress such as a demand is necessary in order to induce property under color of official right. As this Court has often stated, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. McNally v. United States, 483 U.S. 350, 359-60 (1987). Here, "[i]t would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion. McCormick v. United States, __ U.S. __, 111 S.Ct. 1807, 1816 (1991).

In petitioner's case, it is also submitted that the *mens rea* required of Evans was ignored by the district court's charge which focused on the undercover agent and allowed Evans to be convicted

based on his passive acceptance of benefits if determined to be in exchange for a "request" of Evans by the agent. The Eleventh Circuit required no true *quid pro quo* as required by this Court in McCormick v. United States, __U.S.__, 111 S.Ct. 1807 (1991).

II. In Count II of the indictment, the defendant was charged with willfully making a false statement on his tax return in violation of 26 U.S.C. § 7206(1). Petitioner submits that the district court's charge on extortion in Count I contained language that suggested that the money given to Evans may not have been a campaign contribution, language which would have carried over to the charge in Count II. In addition, in the context of this case involving an undercover agent, the district Court again ignored the mens rea of Evans and did not give any assistance to the jury with respect to how to determine whether or not the money given to Evans was a campaign contibution.

Should the Court determine that petitioner was improperly convicted under the instructions given in the district court, his conviction on Count II for willfully making a false statement on a tax return should also be reversed as being derived from and inextricably linked to that offense. Alternatively, this case should be remanded to the district court to determine whether the verdict on Count II can survive in light of the instructions thereon and in the absence of the Hobbs Act conviction.

ARGUMENT AND AUTHORITY

I. THE DISTRICT COURT ERRONEOUSLY CHARGED THE JURY ON EXTORTION UNDER COLOR OF OFFICIAL RIGHT BY NOT REQUIRING INDUCEMENT, AUTHORIZING A CONVICTION BASED ON PASSIVE ACCEPTANCE OF A CONTRIBUTION "IN EXCHANGE FOR" A REQUEST BY THE PAYOR.

THE COURT'S CHARGE ALSO IGNORED THE MENS REA REQUIRED OF THE DEFENDANT, FOCUSING INSTEAD ON THE ACTIONS OF THE PAYOR, AN UNDERCOVER AGENT.

A. *Inducement*

Plainly stated, the issue presented for consideration is whether or not an affirmative act of inducement by a public official, such as a demand, has to be shown as a part of the government's case in an extortion case under color of official right. The statute, 18 U.S.C. § 1951, provides in relevant part as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section--
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

There appears to be general agreement among courts and commentators that the "extortion under color of official right" clause is to be read as requiring "the obtaining of property from

another, with his consent, *induced* . . . under color of official right." The controversy centers upon the meaning of the words "induced under color of official right."

In 1972, the seminal case of United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972), established, almost without discussion, that no proof of threat, fear, or duress was required in a case brought "under color of official right." The decision in Kenny was soon followed by six other circuits.[10]

In 1984 and 1988, the Second and Ninth Circuit Courts of Appeals rendered en banc decisions providing an opposing view. In United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984) (en banc), O'Grady was employed by the New York City Transit Authority as a quality control superintendent when, in 1981, he was indicted under the Hobbs Act for accepting an assortment of benefits valued at approximately $30,000 from companies under contract to provide subway cars to the Authority. Id. at 683-84. As phrased by the Court, the issue was "whether extortion under color of official right occurs when a public official merely accepts unsolicited benefits knowing that they were given because of his public office." Id. at 684. The Second Circuit held that "[a]lthough

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[10] United States v. Hathaway, 534 F.2d 386, 394 (1st Cir.), cert. denied, 429 U.S. 819, 97 S.Ct. 64; United States v. Trotta, 525 F.2d 1096, 1098-1099 (2d Cir. 1975), cert, denied, 425 U.S. 971 (1976), 96 S.Ct. 2167; United States v. Price, 507 F.2d 1349, 1350 (4th Cir. 1974); United States v. Staszcuk, 502 F.2d 875, 877-78 (7th Cir. 1974), rev'd in part on other grounds en banc, 517 F.2d 53 (1975), cert denied, 423 U.S. 837, 96 S.Ct. 65; United States v. Brown, 540 F.2d 364, 372 (8th Cir. 1976); United States v. Hall, 536 F.2d 313, 316-17, 320; (10th Cir.), cert denied, 429 U.S. 919, 97 S.Ct. 313.

receipt of benefits by a public official is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of benefits." Id. at 687.

In United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc), Katherine Aguon was the director of the Department of Education (DOE) in Guam. A co-defendant was a vendor to the Department and provided Aguon with approximately $8500 in home furnishings so that he would have "no trouble" with a maintenance contract with the DOE. Id. at 1160-61. The Ninth Circuit adopted the reasoning of the court in O'Grady and added:

> We hold that proof that the defendant "induced" the improper payment is an essential element in the crime of extortion and that "inducement" can be in the overt form of a "demand," or in a more subtle form such as "custom" or "expectation" such as might have been communicated by the nature of defendant's prior conduct of his office." Id. at 1166.

In 1990, the Eleventh Circuit's decision in United States v. Evans, 910 F.2d 790 (11th Cir. 1990) continued to follow the majority of circuits and joins the issue presented here in very concrete terms. As to the requirement of inducement, the three-judge panel in Evans held that in a Hobbs Act case under color of official right,

> the requirement of inducement is *automatically* satisfied by the power connected with the public office. Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. "The coercive nature of the official office provides all the inducement necessary." Id. at 796-97 (citations omitted) (emphasis in original).

The panel conceded that it "appears somewhat academic to argue

whether inducement is still required if inducement is automatically present by virture of the official's position." Id. at 796, n.5.

Petitioner submits at the outset that the cases relied upon by the third circuit in Kenny do not support the result, but are nevertheless instructive in reviewing the historical development of the law before and after that landmark decision. The rationale of Kenny, now adopted by a majority of circuits notwithstanding individual nuances, is that because the language of § 1951(b)(2) is in the disjunctive, it therefore authorizes two ways for a public official to violate the statute. First, a public official could employ "force, violence or fear," the theory used exclusively by the government prior to Kenny. United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971); United States v. Hyde, 448 F.2d 815, 833 (5th Cir. 1971); United States v. Kubacki, 237 F. Supp. 638, 641 (E.D. Pa. 1965). Alternatively, a public official could use public office "under color of official right" to commit the federal offense of extortion. United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972). Although the literal text of the statute will support that interpretation, it begs the question posed here.

The three judge panel in Kenny continued:

> The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official,[11] and which did not require proof of threat, fear, or duress. Id. at

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[11] At least one commentator apparently disagrees with the proposition that at common law, extortion under color of official right could only be committed by a public official. See Lindgren, *Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L.Rev. 815, 875 *et seq.* (1988).

1229. United States v. Nardello, 393 U.S. 286, 289, 89 S.Ct. 534; United Sates v. Sutter, 160 F.2d 754, 756 (7th Cir. 1947); State v. Begyn, 34 N.J. 35, 167 A.2d 161 (1961); State v. Weleck, 10 N.J. 355, 371, 91 A.2d 751, 759-760 (1952).

It is not clear how the conclusion was reached in Kenny that the common law definition of extortion is what Congress intended to adopt or that the definition of common law extortion referenced in two New Jersey Supreme Court cases is related to the Hobbs Act. In light of the legislative history of this extortion statute and the distinctions existing at the time of its enactment between bribery and extortion, an unexamined assumption from Kenny is whether, in an extortionate scheme "under color of official right," Congress authorized a violation by a showing merely that the officeholder accepted an undue benefit, or whether the public official must still demonstrate an element of "duress" with respect to the "victim" -- some affirmative act of inducement of the benefit supplied -- before a conviction can be obtained.

None of the cases relied upon by the court in Kenny was a Hobbs Act case. Two state decisions are cited. In State v. Begyn, 167 A.2d 161, 34 N.J. 35 (S.Ct. 1961), the defendant was convicted of misconduct in office, not extortion. However, in discussing extortion the Court set out the common law definition:

> Our extortion statute (citation omitted) which had its origin at least as early as 1796, appears on its face to have been originally intended to be reiterative of the common law. (citations omitted). The essence of the offense was the receiving or taking by any public officer, by color of his office, of any fee or reward not allowed by law for performing his duties. The purpose would seem to be simply to penalize the officer who non-innocently insisted on a larger fee than he was entitled to or a fee where none was permitted or required

> to be paid for the performance of an obligatory function of his office. *The matter was obviously of particular importance in the days when public officials received their compensation through fees collected and not by fixed salary. Our early cases dealt with precisely that kind of a situation.* Id. at 166 (emphasis supplied).

The explanation given by the court of the context in which the statute was used at common law -- public officials acting as collection agents for fees due the governing body, part of which paid their own salary -- is noteworthy to the extent that it is unlikely that scheme was widely practiced at the time the Hobbs Act was enacted in 1946.

The second state decision cited in Kenny, State v. Weleck, 91 A.2d 751, 759 (1952) provides the following definition:

> Extortion technically is an official misdemeanor, while *in its larger sense it signifies any oppression under color of right*; in its strict sense it signifies the taking of money by any officer by color of his office where none or a part only is due. 1 Hawk, P.C., p. 418; 2 Bish. Cr.L., § 392; Rev. tit. "Crimes," p. 230, § 23, *as cited in* Kirby v. State, 57 N.J.L. 320, 321, 31 A.. 213 (Sup. Ct. 1894) (emphasis supplied).

Contrary to the opinion in Kenny, "any oppression under color of right," suggests an element of duress for this common law misdemeanor.

Of the federal decisions cited, United States v. Nardello, 393 U.S. 286, 89 S.Ct. 534 (1969) was an extortion case brought under the Travel Act, 18 U.S.C. § 1952. The question presented was whether the Travel Act, which prohibits travel in interstate commerce with intent to carry on "extortion" in violation of the laws of the state in which committed, applied to extortionate conduct classified as "blackmail" but not "extortion" in the

Pennsylvania penal code. In Pennsylvania, the statute entitled "extortion" applied only to the conduct of public officials. The Supreme Court found that the Travel Act "reflects a congressional judgment that certain activities of organized crime which were violative of state law had become a national problem." 393 U.S. at 292; 89 S.Ct. at 538. In language applicable here but not helpful to the decision in Kenny, the Supreme Court in Nardello declined to give "extortion" an unnaturally narrow reading in holding the Act was applicable in the Pennsylvania case:

> Appellees, according to the court below, attempted to obtain money from their victims by threats to expose alleged homosexual conduct. Although only private individuals are involved, the indictment encompasses a type of activity generally known as extortionate since money was to be obtained from the victim by virture of fear and threats of exposure. *In light of the scope of the congressional purpose we decline to give the term "extortion" an unnaturally narrow reading* (citation omitted) and thus conclude that the acts for which appellees have been indicted fall within the generic term extortion as used in the Travel Act. 393 U.S. at 295-96; 89 S.Ct. at 539. (emphasis supplied).

In United States v. Sutter, 160 F.2d 754 (7th Cir. 1947), the second federal case cited by Kenny, a War Department employee was convicted of extortion under color of office for soliciting charitable contributions from manufacturers doing business with his office and keeping the money himself. As the statute, 18 U.S.C. § 171, did not define "extortion," the court determined that the term was used in its common, ordinary sense as distinguished from the sense in which it was known at common law. The Seventh Cicuit noted that the contributions were voluntary and reversed, in language similar to that in Welek, supra, stating, "[i]t is the

oppressive use of official position that is the essence of this offense." Id. at 756. The court also offered the following dictum:

> In the common law offense of extortion, color of public office took the place of the force, threats, or pressure implied in the ordinary meaning and understanding of the word extortion. Ibid.

Professor and former Department of Justice official Charles Ruff, in his article entitled, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171 (1977) [hereinafter *Ruff*], characterizes that dictum in Sutter as being "an explanation wholly at odds with the true common law origins of the offense but later relied on by some courts to define the scope of the parallel provisions of the Hobbs Act."[12] Ruff, supra, at 1182.[13]

Judge Aldisert of the third circuit, dissenting in a post-Kenny decision, commented more fully on the dictum in Sutter:

> Against the backdrop of [the] common law history, it becomes important to understand exactly what Judge, later Justice, Minton meant in *United States v. Sutter, supra*, when, in dictum, he stated that at common law "color of public office took the place of the force, threats, or pressure implied in the ordinary meaning of the word extortion." If this statement means that no force, threat, or pressure need be proved if the officer charged an official fee when none was required by law or charged a fee larger than that provided by law, it is proper.

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[12] See Bianchi v. United States, 219 F.2d 182, 193 (8th Cir.), cert. denied, 349 U.S. 915 (1955) (common law rule that color of office takes place of force, threat, and pressure in case of public official not applicable to union official).

[13] Blackstone defined extortion as "an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due." 4 W. Blackstone, Commentaries 141 (1769).

> But if, outside the context of charging an improper fee for the mandatory performance of official duty, the statement means that one need not prove force, fear or duress at common law to prove wrongdoing on the part of an official, then I agree with Professor Ruff that this is "an explanation wholly at odds with the true common law origins of the offense." (citation omitted) That a number of courts have subsequently parroted Minton's formulation (citation omitted) does not legitimate what was illegitimate when first uttered. Error is not cured by repetition. United States v. Cerilli, 603 F.2d 415, 434-35 (3rd Cir. 1979) (dissenting opinion).

Judge Aldisert's reference sets in perspective the common law misdemeanor of extortion which has little in common with the purposes or focus of the racketeering statute known as the Hobbs Act.

It appears to be generally accepted that the definition of "color of official right" as it now appears in the Hobbs Act was adapted from the New York Penal Law of 1909. See United States v. Enmons, 410 U.S. 396, 406 n.16 (1973); United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971); United States v. Mazzei, 521 F.2d 639 (3d Cir. 1975); United States v. Cerilli, supra, at 431-32 & n.23.[14] The New York law read as follows:

> Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right. Penal Law of 1909, § 850, as

[14] But see United States v. Harding, 563 F.2d 299, 304 (6th Cir. 1977):

> [W]hile it is true that the debates focused on the New York statute as a point of reference, nothing in those debates leads this Court to conclude that Congress intended to adopt New York decisional law as controlling on the federal courts, particularly since the anomalous New York definition of extortion was not articulated until 1960, some 14 years after the passage of the Hobbs Act.

> amended Laws of 1917, ch. 518, reprinted in N.Y. Penal Law, appendix, § 850 (McKinney 1967).

Under New York law, extortion under color of official right was either oppression, the unlawful and malicious arresting of an individual or seizure of his property, or extortion, a public officer's asking, receiving, or agreeing to receive a fee in excess of that allowed by statute or when no such fee is authorized. Id., §§ 854-855. Section 850 carried a penalty of up to twenty years imprisonment but the offenses "under color of official right" were both misdemeanors. Id. § 852. Judge Aldisert was of the opinion that "[u]nless money is received under a specific misrepresentation that it is an authorized fee, a public official cannot be guilty of extortion under New York law in the absence of duress." United States v. Cerilli, supra, at 433 (dissenting opinion).

Although it is reported that comments by Congressman Hobbs and others confirm that the New York statute was the source of the Hobbs Act definition of extortion, there was no discussion by Congress of the under color of official right clause nor of the distinctions under New York law between the various extortion offenses at the time the Act was passed. *Ruff*, at 1183; 91 Cong. Rec. 11,900, 11,906 (1945).

Under New York law at the time, the crimes of bribery and extortion were considered mutually exclusive crimes. "The payor [of a bribe is] equally as guilty as the payee, which could never be the case with extortion." People v. Dioguardi, 8 N.Y.2d 260, 273, 203 NYS.2d 870, 881, 168 N.E.2d 683, 692 (1960). The court in Dioguardi stated that, "the essence of bribery is the *voluntary*

giving of something of value to influence the performance of *official duty'* whereas the essence of extortion is `duress.'" Ibid. (emphasis in original). Dioguardi cited two pre-Hobbs Act cases. See Hornstein v. Paramount Pictures, 22 Misc.2d 996, 37 N.Y.S.2d 404, 412 (Sup. Ct.), aff'd 266 App. Div. 659, 41 N.Y.S.2d 210, aff'd, 292 N.Y. 468, 55 N.E.2d 740 (1942) and People v. Feld, 262 App. Div. 909, 28 N.Y.S.2d 796, 797 (1941).

Thus, bribery was a defense to a charge of extortion in New York. See United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965). Under a bribery statute, of course, both payor and payee are considered guilty parties, whereas in an extortion scheme, the payor is considered a "victim," a distinction maintained in the federal code to this day. *Compare* 18 U.S.C. § 201 (bribery) *with* 18 U.S.C. § 1951 (extortion).

Congressional intent with respect to the under color of official right clause is left uncertain because it simply was not discussed. However, we know the purpose of the Hobbs Act very clearly from its legislative history which has been summarized in a number of cases over the years. See generally, McCormick v. United States, __ U.S. __, 111 S.Ct. 1807, 1818-19 (1991) (Scalia, J., concurring); United States v. Aguon, 851 F.2d 1158, 1163-66 (9th Cir. 1988) (en banc); United States v. Cerilli, 603 F.2d 415, 430-35 (3d Cir. 1979) (Aldisert, J., dissenting); United States v. Harding, 563 F.2d 299, 302-306 (6th Cir. 1977); United States v. Mazzei, 521 F.2d 639, 651-656 (3d Cir. 1975) (in banc) (Gibbons, J., dissenting), cert denied, 423 U.S. 1014, 96 S.Ct. 446 (1975).

The word "extortion" first appeared in the Anti-Racketeering Act of 1946[15], now referred to as the Hobbs Act, which amended the

[15] Act of July 3, 1946, ch. 537, 60 Stat. 420. The 1946 version of § 1951 was modified by Act of June 25, 1948, ch. 645, 62 Stat. 793 to read as it does today. The 1946 version read, in pertinent part, as follows:

Sec. 1. As used in this title-

(a) The term "commerce" means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States had jurisdiction; and the term "Territory" means any Territory or possession of the United States.

(b) The term "robbery" means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(c) *The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.*

Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Sec. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by fine of not more than $10,000, or both.

Anti-Racketeering Act of 1934. The 1934 Act originated in the Senate as S.2248, 73d Cong., 2d Sess. (1934), reprinted in 789 Cong.Rec. 457-58 (1934). It contained no reference to the term "extortion" or the phrase "under color of official right." In the House, however, the bill was completely amended and a new bill substituted. The reasons for the amendment were described by the Supreme Court in United States v. Teamsters Local 807, 315 U.S. 521, 529, 62 S.Ct. 642, 645 (1942):

> After the bill had passed the Senate, however, representatives of the American Federation of Labor expressed fear that the bill in its then form might result in serious injury to labor, and the measure was redrafted by officials of the Department of Justice after conferences with the President of the Federation.

Thereafter, the House Report contained not only the text of the new version of S. 2248 (H.R. 6926)[16] but also reprinted a letter

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(emphasis supplied).

[16] The 1934 Act read in pertinent part:

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce-

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) *Obtains the property of another, with his consent, induced by wrongful use of force of fear, or under color of official right*; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in futherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or

written by the Attorney General to the Chairman of the House Judiciary Committee. That letter makes clear that the Act was intended "to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce," particularly those racketeering activites connected with "price fixing and economic extortion by professional gangsters." See United States v. Mazzei, 521 F.2d 639, 652-53, n.16 (3d Cir.) (en banc), cert. den., 423 U.S. 1014, 96 S.Ct. 446 (1975). The Attorney General's letter makes no mention of extortion "under color of official right," even though the quoted phrase was included in the legislation.

As the re-drafted bill passed both houses, one could infer that Congress intended to include in the Act a form of official corruption that would be considered the public equivalent of the private racketeering by professional gangsters referred to by the Attorney General so that both would be prohibited if carried out by "violence, extortion, or coercion."

As passed, Section 2(b) of the 1934 Act, apparently adapted from the New York statute, read as follows:

> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right;

The phrasing in the Anti-Racketeering Act of 1946 is very close to the 1934 Act and to § 850 of the New York Penal Law:

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persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felong and shall be punished by imprisonment from one to ten years or by a fine of $10,000 or both. Act of June 18, 1934, ch. 569, § 2, 48 Stat. 979-80 (emphasis supplied).

> (c) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

There is no indication that by the time of the 1934 Act most public officials were still paid through the exaction of fees, as they were when the common law of extortion was developed. If Congress had discussed common law extortion and the New York law of extortion under color of official right when the Act was passed, one is hard pressed to imagine that Congress would think it important to set out severe penalties for what had been a common law misdemeanor and was a crime that likely had little, if any, impact on interstate commerce, was not a threat to the nation nor a part of the racketeering problem of "violence, extortion or coercion" that was the focus of the Act.

The penalties adopted by Congress in the Hobbs Act support such inferences. The Hobbs Act carries a penalty of up to twenty years imprisonment and a $10,000 fine. 18 U.S.C. § 1951.[17] The congressional statutory scheme for racketeering provides a greater penalty for extortion, including extortion under color of official right, than for many of the other racketeering offenses. The penalty for extortion is comparable to the penalties for money laundering (18 U.S.C. § 1956) and the use of interstate commerce facilities in the commission of murder-for-hire where personal injury but not death results (18 U.S.C. § 1958). See generally, 18 U.S.C. §§ 1951-1959. These are not misdemeanor offenses.

[17] Today, the fine for individuals could be as great as $250,000. 18 U.S.C. § 3571.

In United States v. O'Grady, supra, the Second Circuit suggested that the enactment of 18 U.S.C. § 201(g) in 1962 prohibiting the receipt of gratuities by federal officials is a clear indication that Congress did not believe the Hobbs Act prohibited bribery. Id. at 691.[18] Along similar lines, an examination of the existing extortion statutes demonstrates that they uniformly express extortion in commonly understood terms such as "demand" (18 U.S.C. §§ 872, 878) or "inducement" (18 U.S.C. §§ 874, 891) or "threats" (18 U.S.C. §§ 875, 876, 877, 891), rather than passive action. As previously noted, the distinction between bribery, where both payor and payee are considered guilty parties, and extortion, where the payor is considered a "victim," is still maintained to this day under the federal bribery and extortion statutes. *Compare* 18 U.S.C. § 201 *with* 18 U.S.C. § 1951.

In reviewing the opinion in Kenny, one cannot ignore the role played by former United States Attorney and later federal district judge Herbert J. Stern in the development of the under color of official right clause. In United States v. Addonizio, 451 F.2d 49, 72 (3rd Cir. 1971), cert. denied, 405 U.S. 936, 92 S.Ct. 949 (1972), a case regarding a prosecution of city officials for conspiracy and Hobbs Act violations decided only a year before Kenny, the third circuit had discussed the extortion/bribery distinction in the following language:

> [W]hile bribery was a voluntary payment made in order to exert undue influence upon the performance of an official

[18] But see United States v. O'Grady, supra, at 707-08 (dissenting opinion).

> duty, extortion involves payment in return for something *to which the payor is already legally entitled.* In other words, while the essence of bribery is voluntariness, the essence of extortion is duress." Id. at 72 (emphasis in original).

Judge Stern was not only the prosecutor in Addonizio and Kenny but he very pointedly and ably argued for an expansive reading of the under color of official right clause through his own law review article. See Stern, *Prosecution of Local Political Corruption under the Hobbs Act: The Unnecessary Distinction between Bribery and Extortion*, 3 Seton Hall. L. Rev. 1 (1971) [hereinafter *Stern*]. Stern was upset by the decision in United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965), a case in which a public official had been acquitted of extortion because the evidence established voluntary payments more akin to bribery than to the duress associated with extortion. *Stern, at 8.* In Kubacki, the court had cited the New York case of People v. Dioguardi, supra, pointing out that at that time bribery was a defense to a charge of extortion. United States v. Kubacki, supra, at 641.

As the Kubacki case demonstrated, according to prosecutor Stern, if those disposed to seek or offer illicit payments became more sophisticated, it would become more difficult for prosecutors to establish the commission of extortion by duress. *Stern,* at 8. Stern realized that for a federal prosecutor the Hobbs Act has significant advantages over the Travel Act, 18 U.S.C. § 1952, which prohibits both bribery and extortion. The jurisdictional base of the Hobbs Act is broader and the penalty of twenty years

imprisonment more significant than provided under the Travel Act.[19] Stern, at 9-11. Professor Ruff concluded that Stern had great success in the courts in his attempts, "both to obtain the easier to prove jurisdictional element of the Hobbs Act and to avoid the difficult to prove duress element by creating a new violation under the Hobbs Act--extortion under color of official right." *Ruff,* 1176-1186; See also, United States v. Cerilli, supra, at 426 (Aldisert, J., dissenting). Beginning with the Kenny case, the federal courts by and large supported such efforts.

Both Judge Gibbons[20], the author of the opinion in Kenny, and Judge Aldisert[21] of the third circuit have spoken of their belief that the legislative history of the Hobbs Act is at odds with its present day use. Judge Noonan, speaking of Judge Stern's efforts and of the decision in Kenny, lends support to the views held by

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[19] The Travel Act provides a penalty of imprisonment of only five years. 18 U.S.C. § 1952. In Rewis v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059 (1971), the Court noted Congress would have realied that an expansive application of the Travel Act "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." Insofar as those factors are not discussed in the legislative history, that suggests that Congress "did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State." Ibid.

[20] "I ask, however, whether anyone reading this 1934 statute aimed primarily at labor racketeering would have anticipated that it regulated state election compaign financing." United States v. Mazzei, 521 F.2d 639, 655 (3d Cir. 1975). (dissenting opinion).

[21] "Nothing in the legislative history shows that the 1934 Act was intended to permit federal authorities to police influence peddling in the political processes of the states." United States v. Cerilli, 603 F.2d at 431 (dissenting opinion).

Professor Ruff and Judges Gibbons and Aldisert:

> Stern's contention that Blackstone supported his interpretation was substantively inaccurate; and Congress had not treated extortion and bribery as the same. A statute banning extortion by federal officials had been on the books since 1909. It had never been interpreted to include bribery. In statutes enacted as recently as 1961 and 1970, Congress had continued to use "extortion" and "bribery" as distinct terms. As effectively as if there were federal common law crimes, the court in *Kenny* ignored Blackstone and congressional usage, for practical purposes amending the Hobbs Act and bringing into existence a new crime--local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun. John Noonan, Bribes, p. 586 (1984).

An examination of the facts of the case under review here demonstrates the blurred distinction between bribery and extortion under the federal scheme as currently interpreted by a majority of the appellate courts. The evidence at trial against John Evans is more conducive to a charge of bribery than one of extortion, i.e., there is little evidence that Commissioner Evans was conditioning his support on the receipt of a campaign contribution.[22] The "payee," an undercover agent, had courted Evans for some sixteen months attempting to gain favorable treatment and was very clearly the aggressor over that period of time, making repeated calls to

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[22] This short colloquy from the cross examination of Agent Cormany makes the point:

Q: [Evans] had never said anything but that he would help you, right?
A: In connection with the scenario we presented to him, yes sir.
Q: He never threatened to withhold his support unless you paid him money, did he?
A: No, sir.
Q: He never said he would only help if you gave him money, did he?
A: No, sir. [R26-200].

initiate meetings with Evans and offering money some thirty times. [R37-211-12]. Had Agent Cormany been a private citizen and not an undercover agent, clearly he would have been charged if bribery had been the offense rather than extortion.

As we have seen, the legislative history of the "under color of official right" clause makes clear that as early as 1934, the Department of Justice was heavily involved in the passage of the legislation which contains the "under color of official right" language, language that would be carried forward in 1946, yet "[f]or more than 30 years after enactment, there is no indication that [these statutes] were applied to the sort of conduct alleged here."[23] McCormick v. United States, __ U.S. __, 111 S.Ct. 1807, 1819 (Scalia, J., concurring). Language employed by this Court almost twenty years ago but applicable here gives meaning to the phrase deja vu:

> "[i]t is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." United States v. Enmons, 410 U.S. 396, 410 (1973).

It is submitted that regardless of how one views the requirements of common law extortion,[24] in light of the legislative history it belies common sense to believe that Congress intended

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[23] Petitioner raised these issues in the district court. See R1-27,47.

[24] *Compare Stern*, at 14-17 (common law extortion requires only an unlawful "taking" of money by a public official) *with* J. Noonan, Bribes pp. 564-91 (1981) (common law extortion requires a demand by a public official).

to eliminate the element of duress or coercion when it included extortion "under color of official right" as part of the Hobbs Act, a statute "to set up severe penalties for racketeering by violence, extortion, or coercion."[25] The twenty year penalty which requires additional proof of only a slight interstate commerce connection renders the "under color of official right" clause of this racketeering statute wholly dissimilar to the common law misdemeanor and its specific context of a low-level public official performing the duties of a collection agent who exacts a greater fee than may be due.

B. *The Jury Charge in United States v. Evans*

In this case, the district court's charge to the jury on the Hobbs Act,[26] provided, in relevant part, as follows:

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[25] See United States v. Mazzei, supra, at 652-53, n.16.

[26] The charge of the district court read, in pertinent part, as follows:

> The defendant can be found guilty of [Title 18, § 1951] only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; second, that the defendant did so knowingly and willfully by means of extortion as hereinafter defined; third, that the extortionate transaction delayed, inter- rupted or adversely affected interstate commerce.
>
> Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.
>
> Extortion under color of official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.[27]
>
> The Eleventh Circuit, speaking of the charge, stated:
>
> We agree with Evans's observation that the charge permitted the jury to convict Evans without finding that he conditioned the performance of an official act upon payment of money. Under the law of this circuit, however, passive acceptance of a benefit by a public

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> other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.
>
> So, if a public official agrees to take or withhold official action or (sic) the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.
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> * * *
>
> The defendant contends that the $8,000 he received from agent Cormany was a campaign contribution. The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> However, if a public official demands or accepts money in exchange for specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution. [R-41-136-141].

[27] The defense excepted to the Court's charge arguing that it was inconsistent with the holding of United States v. Dozier, 672 F.2d 531 (5th Cir. 1982); that it improperly focused on the motives of the contributor instead of on the intent of the public official, and that the language was not sufficiently clear. [R41-152-53].

> official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit. United States v. Evans, 910 F.2d 790, 796 (emphasis in original).

Certainly, the statutory language of the Hobbs Act on its face cannot justify the proposition put forth by the Eleventh Circuit that the power of public office *automatically supplies* the inducement in a Hobbs Act conviction. The better reasoning is that of the Second Circuit which states that "[t]he fact of public office supplies the potential threat or force necessary, but it is the wrongful use of that office to induce benefits that constitutes the crime." United States v. O'Grady, supra, at 688.[28] The court in O'Grady stated that the mere receipt of a benefit by a public official was insufficient since such an interpretation of the Hobbs Act "would place every public official in jeopardy by virtue of his status rather than his venal acts. Id. at 693. (citation omitted). Certainly, the same would be true in the eleventh circuit where inducement is *never* in issue.

The petitioner submits that a proper interpretation of the Hobbs Act requires that element of "duress" which has traditionally characterized the law of extortion, similar to the fifth circuit's statement in United States v. Dozier, 672 F.2d 531, 537 (5th Cir. 1982), *cited in* McCormick v. United States, supra at 1816:

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[28] Compare the dissenting opinion of Judge Gibbons distinguishing between the potential power of the office and the potentially separate power of the officeholder. United States v. Mazzei, supra, at 650-51.

> [A] public official may not *demand* payment as inducement for the promise to perform (or not to perform) an official act. (emphasis supplied).

The plain meaning of "extortion" as commonly understood[29], the development of the Hobbs Act as a "racketeering" statute specifically focused on providing substantial sanctions for extortion and its incorporation of the law of New York where the essence of extortion was "duress" and the distinctions between bribery and extortion had been maintained, as well as the lack of evidence that Congress intended to make this clause of the Hobbs Act applicable to bribery as well as extortion, all support Petitioner's claim that an element of "duress" is required in "extortion under color of official right." As this Court has often stated, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. McNally v. United States, 483 U.S. 350, 359-60, 107 S.Ct. 2875, 2881 (1987). Here, "[i]t would require statutory language more explicit than the Hobbs Act contains to justify a contrary

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[29] See United States v. Sutter, supra, where, relying on a dictionary definition of extortion, the court held a federal employee commits extortion when he "uses his office to place another under compulsion of fear, force, or the undue exercise of power, so that such person parts with something of value unwillingly and involuntarily." Id. at 756. Extortion is ordinarily understood to mean the act of obtaining money by consent, where the consent is induced by a threat of some kind of injury in the future. 2 W. LaFave & Scott, *Substantive Criminal Law*, § 8.12 (1986).

conclusion. McCormick v. United States, supra at 1816.[30]

C. *Mens Rea and Quid Pro Quo*

In Evans as in Aguon, "one searches the instructions on extortion almost in vain for any instructions enlightening the jury on *mens rea*." United States v. Aguon, supra, at 1168. By juxtaposing the minimal requirement of a passive acceptance by Evans and an affirmative "specific request" required of the undercover agent, the district court's instruction places the focus on the actions of the agent rather than the intent of the public official. Again, the fifth circuit in United States v. Dozier, supra, correctly stated the point:

> The emphasis is on the defendant's own motives rather than on his perception of a potential contributor's motive. The issue is whether Dozier "knowingly and willingly" induced some of his constituents to pay him money by threatening to take or withhold official action, not whether he accepted money as contributions with "knowledge" of a donor's corrupt intent. Id. at 542.

What the fifth circuit in Dozier characterized as *not* in issue, i.e., "whether [Evans] accepted money as contributions with 'knowledge' of the [undercover agent's] corrupt intent," is in essence what the district court charged and the Eleventh Circuit

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[30] Compare, United States v. Enmons, supra, at 411:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal government in the business of policing the ordlerly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States. (citations omitted).

held was the correct interpretation of the Hobbs Act in Evans:

> In order to secure a conviction under the Hobbs Act, the government must demonstrate, among other things, that the public official knew that the payment he received was motivated by a hope of influence. United States v. Evans, supra at 798.

The position of the Eleventh Circuit which finds inducement in every benefit by virture of public office and requires a public official to be aware of the motivations of donors must be considered troublesome on its face. Every campaign contribution and every benefit received by every public official in the Eleventh Circuit has, without other showing, satisfied the inducement requirement of the Hobbs Act while public officials remain the captives of the intent of their donors. This language of the fifth circuit in United States v. Dozier, supra, seems more in line with present day reality:

> As a sister court has observed, "No politican who knows the identity and business interests of his campaign contributors is ever competely devoid of knowledge as to the inspiration behind the donation." United States v. Brewster, 506 F.2d 62, 81 (D.C. Cir. 1974). Consequently, we do not seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectations of future benefits. We must, nevertheless, discover and penalize those who, under the guise of requesting "donations," demand money in return for some act of official grace. Id. at 537.

In McCormick v. United States, supra, this Court said, "[t]he receipt of . . . contributions is . . . vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." Id. at 1816. Mere knowledge of the donor's intent cannot be

sufficient.

Petitioner also submits the Eleventh Circuit in United States v. Evans, supra, did not require a true *quid pro quo*. In McCormick v. United States, supra, the government conceded and this Court held that if payments to the public official were campaign contributions, proof of a *quid pro quo* is essential. Id. at 1817. The Eleventh Circuit's charge to the jury in Evans does not meet this requirement.

The district court's charge to the jury authorized a conviction based on a passive acceptance of money in exchange for a specific requested exercise of official power *even though the payment is in the form of a campaign contribution*. There is a substantial difference between a "specific requested exercise of official power" as approved by the Eleventh Circuit in Evans and a "specific exercise of official power."

If a public official accepts a contribution "in exchange for" a specific request of him, the defendant submits that there is no quid pro quo *until and unless he complies or attempts to comply with the request since no action at all has been required of the defendant*. In Evans, the defendant could passively accept money and without more be convicted of Hobbs Act extortion based upon the undercover agent's "request," timed to take place simultaneously with Evans' acceptance of the contribution, regardless of whether Evans had formed an intent to comply or took any steps to comply. The case for the government becomes even easier if the "request" is to forbear from action.

Irrespective of Evans' intent, by becoming a public official he has "induced" the contribution and by passively accepting money given in exchange for a "request" of him he has engaged in what passes for a *quid pro quo* in the Eleventh Circuit. A statement from United States v. O'Grady, supra is equally applicable here:

> "In this case, the jury instruction was erroneous because in effect it mandated an inference of inducement merely upon a finding of acceptance of benefits with knowledge of the donor's motivation." Id. at 694 (concurring opinion).

Here, that inference was allowed because the jury was not required to distinguish between the intent of the undercover agent, which was never in doubt, and the intent of the defendant.

The second circuit in Aguon stated that "criminal intent must be submitted to the jury in a case charging extortion under the Hobbs Act" and failure to do so was plain error. United States v. Aguon, supra, at 1168. *A fortiori*, the objection made at trial here should have been sustained by the district court.[31]

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[31] See note 18, supra.

II. SHOULD THIS COURT DETERMINE THAT PETITIONER EVANS WAS IMPROPERLY CONVICTED UNDER THE INSTRUCTIONS GIVEN IN THE DISTRICT COURT ON EXTORTION UNDER COLOR OF OFFICIAL RIGHT, THE CONVICTION ON COUNT II FOR WILLFULLY MAKING A FALSE STATEMENT ON A TAX RETURN SHOULD ALSO BE REVERSED AS BEING DERIVED FROM AND INEXTRICABLY LINKED TO COUNT I. ALTERNATIVELY, THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT TO DETERMINE WHETHER THE VERDICT ON COUNT II CAN SURVIVE IN LIGHT OF THE INSTRUCTIONS THEREON AND IN THE ABSENCE OF THE HOBBS ACT CONVICTION.

In the district court the jury was instructed on Count I:

> However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made *in the form of* a campaign contribution. R41-141. (emphasis supplied).

A proper inquiry is why the district court's language was not, "regardless of whether the payment *is* a campaign contribution," rather than "regardless of whether the payment is made in the form of a campaign contribution." There is an inference in the district court's use of the phrase "in the form of a campaign contribution" that suggests that the money given to Evans may have been disguised as a campaign contribution but, in reality, may be an extortionate payment.

The district court did not make such a distinction in its charge on Count II, emphasizing the different treatment given to "campaign contribution" in Count I. On Count II, charging Evans with willfully making a false statement on his tax return, the jury was charged as follows:

> I instruct you further that if you find that the money the defendant received from Cormany *was* a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to

> report it as income on his federal income tax return. R41-144. (emphasis supplied).

Although the Court gave a definition on what a campaign contribution "can involve,"[32] it did not say what it "cannot involve" or otherwise explain the inference left with the jury as the result of the instruction in Count I.

In addition, as in Count I, one searches in vain for any instruction enlightening the jury on the intent required of Evans, in particular, or the parties, in general. In McCormick v. United States, __ U.S. __, 111 S.Ct. 1807, 1815 (1991), this Court said:

> We agree with the Court of Appeals that in a case like this it is proper to inquire whether payments made to an elected official are in fact campaign contributions, and we agree that the intention of the parties is a relevant consideration in pursuing this inquiry.

No such assistance was given to the jury in Evans, yet because an undercover agent was the payor, it was vital that some instruction be given as to whether or not an undercover agent could give a legitimate campaign contribution. In whose eyes was the jury to look to determine whether or not it was a campaign contribution? Was it a question of whether Cormany intended the money to be a campaign contribution or was it the intention of Evans that counted?[33] Certainly, there could be no question where the undercover agent stood on this issue.

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[32] A campaign contribution can involve a gift, loan, forgivenessof debt, advance or deposit of money or the conveyance or transfer oof anything of value for the purpose of influencing the nomination or the election of any person for office. R41-141.

[33] An objection was made in the district court that the instruction did not adequately establish who had the burden to prove that it was a campaign contribution. R42-10-11.

The charge was already heavily focused on Cormany, the undercover agent, since if Cormany made a specific request "in exchange for" Evans acceptance of money, there was, *ipso facto*, a violation of the Hobbs Act, regardless of whether the payment was "in the form of" a campaign contribution.

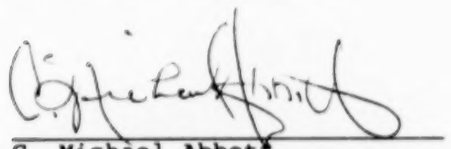
The charge in Count I erroneously suggested to the jury that if they found Evans guilty of extortion, the money he had received from the undercover agent was not a campaign contribution. Furthermore, since the offense in Count II was derived from and inextricably linked to Count I, Count II should also be vacated should the Court vacate the conviction in Count I.

This issue was not directly raised in the Court of Appeals and was presented in the petition for certioari as a "subsidiary question fairly included" in Issue I. *Sup.Ct.R.* 14.1.(a). Alternatively, therefore, it is suggested that the issue on Count II be remanded to the district court to determine whether the verdict on Count II can survive in light of the instructions thereon and in the absence of the Hobbs Act conviction.

CONCLUSION

For the foregoing reasons and based upon the authorities cited, this Court should reverse the defendant's conviction in the United States District Court for the Northern District of Georgia.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Petitioner upon:

Kenneth W. Starr
Solicitor General
United States Department of Justice
Washington,D.C. 20530

by placing a copy of the aforesaid brief in the United States Postal Service with adequate postage affixed thereon to ensure delivery.

This 5th day of August, 1991.

C. MICHAEL ABBOTT

APPENDIX

STATUTES INVOLVED

18 U.S.C. § 1951 ("The Hobbs Act")

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000, or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

. . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(1)

§ 7206. Fraud and false statements

Any person who --

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .